

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
and)	Case No. 15-RC-096096
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL 991,)	
)	
Petitioner.)	

**PETITIONER’S RESPONSE TO EMPLOYER’S REQUEST FOR RECONSIDERATION
OF BOARD CERTIFICATION OF UNION IN LIGHT OF NOEL CANNING**

Petitioner International Brotherhood of Teamsters, Local Union No. 991 (“Union” or “Petitioner”) herein responds to the Employer’s Request for Reconsideration of Board Certification of Union in Light of Noel Canning filed with the Board on February 16, 2014. In light of the U.S. Supreme Court’s recent decision in *NLRB v. Noel Canning*,¹ Durham School Services, L.P. (the “Employer”) asks the Board to reconsider its May 9, 2014 certification of the Petitioner as the exclusive collective-bargaining representative of a unit of certain drivers and monitors employed by the Employer in Milton, Navarre and Pace, Florida and direct a new election.

I. Statement of the Case

Indisputably, Regional Director Kathleen McKinney was lawfully appointed in 2008 at a time that the Board held a quorum and possessed authority to delegate its Section 9 powers. Petitioner filed a petition on January 10, 2013 and the Regional Director approved a Stipulated Election Agreement on January 24, 2013. The election was held on February 22, 2013. The official Tally of Ballots, which was signed by a representative of the Employer certifying that

¹ No. 12-1281, 2014 U.S. LEXIS 4500 (Jun. 26, 2014).

“the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated,” indicates that Petitioner won the election. Despite this certification, the Employer filed Employer’s Objections to the Conduct Affecting the Result of the Election with Region 15 on or about March 1, 2013, which contained three objections. The Regional Director issued her Report and Recommendation on Objections on March 25, 2013 in which she rejected each of the Employer’s objections. On May 9, 2014, the Board adopted the Regional Director’s Report and Recommendation and certified the Petitioner.

On July 16, 2014, the Employer filed the Employer’s Request for Reconsideration of Board Certification of Union in Light of *Noel Canning*. Therein, the Employer asks the Board to invalidate its certification of the Petitioner because the Regional Director ordered the election and tallied the ballots during a period of time (February 22, 2013) in which the Board was improperly constituted and lacked a valid quorum. That is, because the Board lacked the authority to act under Section 9 at that time, so too did the Regional Director (as the Board’s Section 3(d) designee) lack the authority to act under Section 9.

II. Argument

Even assuming that the Employer’s request for reconsideration is procedurally proper, its argument (that the Regional Director lacked authority under *Noel Canning*) is incorrect on the merits. The Board has previously considered and rejected identical arguments by other employers. *SSC Mystic Operating Company, LLC*, 360 NLRB No. 68, n. 1 (Mar. 31, 2014); *UC Health*, 360 NLRB No. 71, n.2 (Mar. 31, 2014). In both cases, the Board stated:

even if the Board lacked a quorum at the time the Regional Director conducted the election, that circumstance would not impair the Regional Director’s authority to process the instant petition. The Board has delegated decisional authority in representation cases to Regional Directors, 26 Fed.Reg. 3911 (1961), pursuant to the 1959 amendment of Sec. 3(b) of the National Labor Relations Act expressly authorizing the delegation, Pub. L. 86- 257, 86th Cong., 1st Sess., § 701(b), 73

Stat. 519, 542; *see Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Sec. 3(d) Congress allowed the Board to make a delegation of its authority over representation elections to the regional director). Pursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment.

Id.

Most notably, the Board relied in part on the U.S. Supreme Court's decision in *New Process Steel v. NLRB* to reject arguments that "the lack of a Board quorum voids the previous delegations of authority to nonmembers, such as Regional Directors." *Id.* (citing *New Process Steel v. NLRB*, 560 U.S. 674, 684 n. 4 (2010)). The Board's reliance on *New Process Steel* is significant because in that case the U.S. Supreme Court declined to follow the reasoning of the very case that the Employer now cites in support of its argument here: *Laurel Baye of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). *Compare* Req. for Recon. at 4 and *New Process Steel*, 560 U.S. at 684 n.4.

Just like the Regional Directors in *SSC Mystic Operating Company* and *UC Health*, the Regional Director here was properly delegated the authority to direct, conduct and certify elections at a time the Board had a quorum. Also like the Regional Directors in *SSC Mystic Operating Company* and *UC Health*, the Regional Director here did not lose her power to direct, conduct and certify elections by virtue of the Board's subsequent loss of a quorum. Consequently, all her actions with respect to the February 22, 2013 election are valid and the Employer has not and cannot show otherwise.

III. Conclusion

For the reasons set forth above, the Petitioner respectfully urges the Board to deny the Employer's request for reconsideration.

Respectfully submitted this 17th day of July, 2014,

/s/ David C. Tufts

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by electronic mail on this 17th day of July, 2014 on the following persons:

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